Supreme Court, U.S.
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No. 99-1604

IN THE

Supreme Court of the United States

LORI DOLAN, *et al.*,

Petitioners,

v.

GENERAL PUBLIC UTILITIES CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS GENERAL PUBLIC UTILITIES CORPORATION, *et al.*

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LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENTS

A. In addition to General Public Utilities Corporation, the following Respondent companies are joining in this opposition:

Metropolitan Edison Company; Jersey Central Power & Light Company; Pennsylvania Electric Company; McDermott Incorporated (previously known and identified as J. Ray McDermott & Company); Raytheon Constructors Inc. (previously known and identified as Catalytic, Inc.); Burns & Roe Enterprises, Inc.; and Dresser Industrial Valve and Instrument Division of Dresser Industries, Inc.

B. Rule 29.6 Statements for the Respondents are as follows:

Metropolitan Edison Company, Jersey Central Power & Light Company, and Pennsylvania Electric Company, are each wholly-owned subsidiaries of General Public Utilities Corporation. No publicly held company owns 10% or more of the stock of General Public Utilities Corporation.

McDermott Incorporated is a wholly-owned subsidiary of McDermott International, Inc. The Prudential Insurance Company of America owns more than 10% of the stock of McDermott International, Inc.

Burns & Roe Enterprises, Inc. is a wholly-owned subsidiary of Roe Enterprises, Inc., which is a wholly-owned subsidiary of Winona Hudson Corporation, which is a wholly-owned subsidiary of Warwick and York, Inc. No publicly held company owns 10% or more of the stock of Warwick and York, Inc.

Raytheon Constructors Inc. is a wholly-owned subsidiary of Raytheon Constructors International, Inc., which is a wholly-owned subsidiary of Raytheon Engineers & Constructors International, Inc., which is a wholly-owned subsidiary of Raytheon Company. Franklin Resources, Inc. owns more than 10% of the stock of Raytheon Company.

Dresser Industries, Inc. is a wholly-owned subsidiary of Halliburton Company. No publicly held company owns 10% or more of the stock of Halliburton Company.

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Petitioners assert in the first part of their Petition that they were accorded too much process — that the district court examined too carefully their proposed expert evidence. In this regard, Petitioners contend that *Daubert* notwithstanding, district courts should not take too seriously their gatekeeping responsibilities. Petitioners assert in the second part of their Petition that they were accorded too little process — that the district court refused to consider much material from Petitioners' experts that had not been disclosed timely. In this regard, Petitioners contend that deadlines for expert disclosures should not be relevant in a hearing under Fed. R. Evid. 104, inquiring into whether the proposed expert testimony is admissible.

Neither of Petitioners' fundamentally inconsistent pleas requires or deserves review by this Court.

COUNTERSTATEMENT OF THE CASE

Petitioners are generally correct in their description, when shorn of its characterizations, of the events from which the case arose and the course of proceedings below. Two respects in which the Petition misdescribes the record, however, could be meaningful to an assessment of the questions presented and must be addressed.

1. The Trial Court Did Not Exclude True Rebuttal or Explanatory Material

The major premise for Petitioners' argument that they were unfairly hamstrung in their efforts to establish the reliability of their expert witness proffers is their assertion that the district court refused to consider, as untimely, affidavits and reports which merely sought to explain, but not change, their timely expert reports. Thus they emphasize, by italics, their claim:

> *These* [the untimely] *affidavits and evidentiary materials did not change the principal theories and concepts advanced in the petitioners' expert reports. Rather, they were directly responsive to the criticisms directed at petitioners' experts by defendants and their experts.*

Petition at 9.

This claim is simply not true. Respondents did not challenge any reports or disclosures properly characterized as rebuttal or supplemental under Fed. R. Civ. P. 26(a). The materials which Respondents objected to, and the trial court excluded, presented different methods or techniques to arrive at similar conclusions, or changes to a described method or technique in an effort to cure a flaw in the original which had been exposed by Respondents' *in limine* challenge, or reports from altogether new and different experts proposing to testify about altogether new and different analyses of new and different data, well after the deadline for expert disclosures had passed.

For example, as the trial court observed with respect to Petitioners' leading expert:

> Each time Professor Shevchenko states his methodology Defendants challenge a component of that methodology and Professor Shevchenko alters the methodology to rebut the challenge. . . . A purportedly scientific opinion that constantly changes merely to avoid critique can hardly be said to be based upon "good grounds."

In re TMI Litig. Cases Consol. II, 922 F. Supp. 997, 1015 (M.D. Pa. 1996) (J. App. 434a).

Similarly, Petitioners had timely proffered one expert, Dr. Portman, to testify about radiation levels as he estimated them to have been, based on his analysis of porcelain insulators taken from old electric fences in the area. Respondents criticized this analysis on two principal grounds: (1) it failed to take account of background radiation levels, which could fully explain its findings; and (2) it failed to take account of the radiation due to uranium in the porcelain glaze. Faced with these challenges, Petitioners did not call Portman to testify at the *in limine* hearing, but instead sought to submit a new analysis, from a new expert, Dr. Smierennyi, based on an analysis of enamel from teeth extracted from residents in the area. Smierennyi's analysis, however, could hardly be characterized as something "which rebutted, explained, amplified and/or supplemented" (Petition at 9) Petitioners' original expert's analysis based on electric fence insulators. Smierennyi's method involved a different medium, a different analytic model, and a different witness, yet Petitioners never sought leave of court to make this radical untimely change.

These are but examples of the constantly shifting means by which Petitioners sought to buttress or maintain the conclusions of their original experts They illustrate, however, how Petitioners misrepresent the record when they assert that their untimely expert presentations merely "explained" their timely submissions, or "rebutted" Respondents' critiques of their timely submissions.[1]

1. Petitioners' effort to shore up their experts' conclusions, in response to Respondents' reliability challenge under *Daubert*, was fundamentally misguided in any event: under this Court's decision in *Daubert*, the focus of the admissibility inquiry must be on methodology, not conclusions. *Daubert v. Merrell Dow*

(Cont'd)

2. The Trial Court Did Not "Require" Petitioners To Meet a "Swollen Catalog of Essential Criteria"

Petitioners' second potentially significant mischaracterization of the record is their assertion that the district court adopted twelve different criteria that it required their proffered expert testimony to meet, and that:

> This swollen catalog of essential criteria that the district court required petitioners to satisfy for the admissibility of each and every one of the experts' opinions has no support under the Rules of Evidence or this Court's decisions.

Petition at 12.

In the first place, it is apparent that many of the "swollen catalog" of criteria are simply a different way of describing exactly the same criteria which this Court identified in *Daubert*. Thus, although Petitioners castigate the district court for adopting the criterion of "falsifiability" (Petition at 12), this is identical to "testability," which this Court identified as the hallmark of scientific methodology. *Daubert*, 509 U.S. at 593. Petitioners similarly castigate the district court for adopting the criterion of "consistency with accepted theory," yet this Court also articulated "general acceptance" as a mark of reliable science. *Id.* at 594. And Petitioners condemn the district court's reference to

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Pharmaceuticals, Inc., 509 U.S. 579, 594-95 (1993). Two or three demonstrably unreliable methods do not validate another demonstrably unreliable method, even though all of them might suggest the same (Q.E.D.) conclusion.

"precision" as a potentially relevant criterion, yet this Court has identified the "known or potential rate of error" as another potentially relevant factor in the reliability analysis. *Id.* The last category identified by the district court, "logical consistency," hardly ought to be controversial.

Petitioners' criticism of the district court for articulating the various ways in which it intended to assess reliability is misguided for additional reasons. The majority decision in *Daubert* itself makes plain that the criteria articulated there are suggestions, not a litmus test. 509 U.S. at 593. In addition, the district court here made plain that it did not (contrary to Petitioners' claim) regard each and every "criterion" in its "catalog" to be "essential" to admissibility. As the district judge herself explained:

> Again, the court must stress that it is not using these factors as a checklist. Failure to meet [one or another] factor listed above will not *per se* indicate inadmissible evidence. The court, rather, views both sets of factors as a flexible construct from which the court will develop an opinion as to the reliability of the evidence.

J. App. at 675a. This approach is fully consistent with this Court's opinion in *Daubert*, and its more recent opinion in *Kumho Tire*.[2]

Thus neither of the stated factual premises on which the Petition is based finds support in the actual record below.

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2. *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999).

REASONS FOR DENYING THE WRIT

A. How The Gatekeeping Function Was Performed in This Case Does Not Warrant Review

Petitioners' first reason for granting review is that the critical assessment of the reliability of their expert testimony is said to trespass on their Seventh Amendment rights to a trial by jury. According to Petitioners, once the qualifications of their experts were recognized, any difference of opinion with defendants' experts represented nothing more than "a classic jury question" requiring trial. Petition at 19. According to Petitioners, the district court infringed on their right to a jury trial by having a hearing — especially a lengthy and expensive hearing — on the admissibility of Petitioners' expert testimony. *Id.* at 18-21.

Petitioners point to no conflict in the Circuits, or with prior decisions of this Court, justifying review. To the contrary, the arguments advanced by Petitioners are contradicted by this Court's several decisions over the past few years dealing with expert testimony.

1. Plaintiffs' Seventh Amendment Rights Were Not Compromised

Plaintiffs assert that by granting summary judgment as a consequence of the performance of the gatekeeping function, the courts below trampled on plaintiffs' jury trial right under the Seventh Amendment. As recently as this February, however, this Court affirmed that a plaintiff's Seventh Amendment rights were not compromised when an appellate court determined that expert testimony had been admitted improperly under *Daubert*, that the verdict-winning plaintiff had not provided other evidence sufficient to fill

the gap created by the appellate court's exclusion of that expert testimony, and therefore that judgment as a matter of law should be entered against the plaintiff. *Weisgram v. Marley Co.*, 120 S. Ct. 1011 (2000).

Indeed, each of *Daubert*, *Joiner*,[3] and *Kumho Tire* involved a case in which the lower court's exclusion of expert testimony resulted in summary judgment dismissing the plaintiff's claim.[4] Plainly, there is no Seventh Amendment

3. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

4. Cases in the Courts of Appeals, in which summary judgment flowed from the exclusion of expert evidence, are legion: *See, e.g., Vadala v. Teledyne Indust., Inc.*, 44 F.3d 36 (1st Cir. 1995) (affirming summary judgment following exclusion of expert testimony regarding cause of airplane crash); *Turrentine v. Bell Canada*, 173 F.3d 846 (2d Cir.) (affirming summary judgment following exclusion of medical causation testimony in repetitive stress injury litigation), *cert. denied*, 120 S. Ct. 538 (1999); *Cavallo v. Star Enterprise*, 100 F.3d 1150 (4th Cir. 1996) (affirming summary judgment following exclusion of medical causation expert testimony in fuel spill litigation); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375 (5th Cir. 1996) (affirming summary judgment following exclusion of medical causation expert testimony in environmental contamination superfund litigation); *Kalamazoo River Study Group v. Rockwell Intl. Corp.*, 171 F.3d 1065 (6th Cir. 1999) (affirming summary judgment following exclusion of medical causation expert testimony in PCB litigation); *Clark v. Takata Corp.*, 192 F.3d 750 (7th Cir. 1999) (affirming grant of summary judgment following exclusion of biomechanical engineer's expert testimony regarding lap belt failure in an auto accident); *Jaurequi v. Carter Manufacturing Co, Inc.*, 173 F.3d 1076 (8th Cir. 1999) (affirming summary judgment following exclusion of mechanical engineer and human factors expert testimony in products liability litigation); *Cabrera v. Cordis Corp.*, 134 F.3d 1418 (9th Cir. 1998) (affirming

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impediment to the district courts' performance of their gatekeeping role, even if the consequence is summary judgment.

2. Petitioners' Contention That The Burden of Establishing Reliability Is "Light" Is Mistaken

Petitioners contend that "the burden for establishing the admissibility of expert evidence is light, as cross-examination affords protection against juries accepting outrageous conclusions proffered by experts." Petition at 23-24. According to Petitioners, the *in limine* process here "crystallized . . . that highly credentialed experts proffered by plaintiffs and defendants had a difference of opinion. This presented a classic jury question, and the case should have proceeded to trial." Petition at 19.

Again, Petitioners point to no conflict in the Circuits, or with prior decisions of this Court, justifying review. It is Petitioners' contention which conflicts with this Court's recent decisions. As Justice Ginsburg, writing for a unanimous Court, observed in *Weisgram*, *supra*: "Since *Daubert*, . . . parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet." 120 S. Ct. at 1021.

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summary judgment following exclusion of medical causation testimony in products liability action); *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594 (9th Cir. 1996) (affirming summary judgment following exclusion of medical causation testimony in Bendectin litigation); *Mitchell v. Gencorp Inc.*, 165 F.3d 778 (10th Cir. 1999) (affirming summary judgment following exclusion of medical causation expert testimony in toxic exposure litigation); *Allison v. McGhan Medical Corp.*, 184 F.3d 1300 (11th Cir. 1999) (affirming summary judgment following exclusion of medical causation expert testimony in breast implant litigation).

Nor is it true, as Petitioners suggest, that the district courts should terminate the gatekeeping inquiry as soon as it is determined that a proffered expert is "credentialed." The text of Rule 702 itself reflects that "qualifications" is a consideration separate and apart from whether "scientific, technical, or other specialized knowledge will assist the trier of fact. . . ." Fed. R. Evid. 702. And one cannot read *Daubert* to conclude that evidence of an expert's qualifications forecloses further consideration of the reliability of the expert's proposed testimony. The criteria suggested in *Daubert* relate not to the qualifications of the witness, but to the scientific reliability of the proposed testimony. This is apparent from Justice Blackmun's description of the task. The gatekeeping function "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." 509 U.S. at 592-93.

Petitioners' singular focus on their experts' supposed qualifications finds no support in this Court's decisions.

3. Petitioners' Quarrel With the Intensity of the District Court's Efforts Does Not Warrant Review

The third theme pervading Petitioners' Seventh Amendment argument is that by conducting a seven week *in limine* hearing, that hearing "became a surrogate for a jury trial." Petition at 10-11. Obviously regarding such proceedings as excessive, Petitioners characterize the district court's actions as a "pretextual use of the *in limine* hearing process. . . ." *Id.* at 11. These criticisms, however, are contradicted by the record and this Court's own decisions.

As the Petition states:

> Given that the TMI accident involved complex circumstances, petitioners proffered a substantial amount of scientific evidence. Petitioners retained approximately 20 well-qualified experts to evaluate and support their case. . . .
>
> Each expert had a specific area of responsibility, such as the analysis of: data on the pathways of escape of radiation from TMI; data on meteorological conditions; data on the TMI area topography; damage to trees; damage to chromosomes; damage to immune systems; disease trends; and more.

Petition at 6-7. These multiple experts "proffered comprehensive reports of varying lengths, some of which exceeded 100 pages, as part of the comprehensive scientific inquiry that was necessitated by the complexity of the accident." Petition at 18.

The standard for review of the district court's decision whether to conduct an *in limine* hearing is one of abuse of discretion:

> Our opinion in [*General Electric Co. v.*] *Joiner* [522 U.S. 136, 118 S.Ct. 512 (1997)] makes clear that a court of appeals is to apply an abuse-of-discretion standard when it review[s] a trial court's decision to admit or exclude expert testimony. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion.

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999) (internal citation and quotation marks eliminated). Given the complexity of the subject matter and the extensiveness of the expert materials which had to be evaluated, it can hardly be said to have been an abuse of discretion for the district judge to decide that she wanted to have a hearing, and that she wanted the experts to explain first hand (and be subject to cross examination about) their methods and how they applied them here.

Considering that Respondents, as the parties challenging the expert proffers, had to make their own showing on the lack of reliability of the methods used by Petitioners' experts, and that Petitioners then were given an opportunity to have their experts explain and defend their methodologies, it is hardly remarkable that the district court heard from 31 experts, seventeen from plaintiffs' side and fourteen from the defendants' side. Nor, considering the scientific complexity of many of the subject areas involved, is it surprising that the district court devoted 20 days, in total, to those hearings.[5]

In sum, given the facts and circumstances of this case, the *in limine* process utilized by the district court went far to protect, and certainly did not trammel, Petitioners' rights.[6]

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5. While those 20 days were spread over seven different weeks, that does not make it true, as the Petition exclaims: "Seven weeks of hearings were conducted!" Petition at 10.

6. The Court of Appeals for the Third Circuit has made plain to the district courts in that Circuit that when summary judgment may flow from a decision to exclude proffered expert evidence, courts must be careful to assure that there is "adequate process at

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B. The Supposed Conflict Between Rule 104 of the Federal Rules of Evidence and Rules 26 and 37 of the Federal Rules of Civil Procedure Does Not Warrant Review

Petitioners' second major contention is that the courts below erred in restricting the *in limine* process to an assessment of Petitioners' *timely* expert disclosures. Petitioners assert that according to Fed. R. Evid. 104(a) and this Court's decision in *Bourjaily v. United States*, 483 U.S. 171 (1987), the district courts are required to consider theretofore undisclosed reasons why a disclosed opinion is reliable. Central to this contention is their assertion that "Rule 26(a)(2)(B) [Fed. R. Civ. P.] requires only a narrowly prescribed set of expert-related information to be produced. . . ." Petition at 23.

The short answer to this contention is that Fed. R. Civ. P. 26(a)(2)(B) in fact commands the disclosure of "a *complete* statement of *all* opinions to be expressed *and the basis and reasons therefore;* [and] *the data or other information considered* by the witness in forming the opinions. . . ." (Emphasis added.) Certainly this includes, at a minimum, a description of the methodology utilized by the witness, and how she applied it in the circumstances at hand.

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the evidentiary stage. . . ." *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 854 (3d Cir. 1990). Process, undoubtedly, requires time, and time has its associated expense. It is therefore ironic that Petitioners' counsel would complain about the cost to them (Petition at 10, 21), in this entrepreneurial litigation, of the process intended to protect their clients' rights.

Under the regime advocated by Petitioners, an expert could proffer an opinion with virtually no description of how it was arrived at. The litigation adversary could then take the expert's deposition and develop several compelling reasons why the expert's method, as described in the deposition, was unreliable, and therefore why the opinion should not be accepted as scientifically reliable. However, when confronted with an *in limine* motion based on this record, the proponent of the expert would be free to advance any additional grounds which either the challenged expert, or any other expert, could come up with as to why the original conclusion was valid. Even though there would have been no opportunity to challenge these new grounds through the adversarial process, the trial court would be required to accept evidence about and presumably even credit these hitherto undisclosed grounds.

Nothing in this Court's jurisprudence supports such a rejuvenation of the "trial by ambush" approach. Rule 26, in fact, was adopted precisely to foreclose such an approach. *See* Advisory Committee Notes to 1993 Amendments ("The information disclosed under the former rule in answering interrogatories about the 'substance' of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness."). One of the most thoughtful commentators on the process to be developed in the wake of *Daubert*, Professor Berger, has written on precisely this issue:

> Although the district court has enormous discretion on how to proceed, oral testimony and depositions should clearly be preferred [over affidavits]. Courts should not permit parties to

> submit evidence from undisclosed experts or to raise new issues for the same reasons [they] should not allow defendants to rely on this evidence in obtaining a Rule 104(a) inquiry. Courts cannot attain the Supreme Court's objective in *Daubert* — to honor the "liberal thrust" of the Federal Rules towards expert opinion while simultaneously demanding reliability — if they base decisions to exclude experts on allegations not yet tested through the adversarial process.
>
> Consequently, a court should generally *restrict its review to materials developed during discovery* when it rules on a Rule 104(a) motion. . . .

Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345, 1374-75 (1994) (emphasis added).

Second, Petitioners would convert Rule 104's *permission* to hear inadmissible evidence (presumably when the institutional values of the Rules warrant doing so) into a *command* to hear inadmissible evidence, regardless of the institutional values of the Rules. The values sought to be furthered by Fed. R. Civ P. 26 and 37 — an adversarial process strengthened by disclosure in advance of the hearing or trial — are in no way inconsistent with the values sought to be furthered by Fed R. Evid. 104(a), which simply recognizes the practical necessities attendant upon some types of preliminary inquiries (for example, the impracticability of requiring the declarant to appear and testify that he was unavailable to testify, or of requiring the decedent to appear and testify that his was indeed a dying

declaration). Rule 104, after all, is itself a procedural rule in service of the content of other rules, such as Fed. R. Evid. 702, which substantively demands that proffered expert scientific testimony be scientifically reliable. It would be inconsistent with that latter rule to hold that untested, undisclosed, and therefore inadmissible evidence of supposed scientific reliability must nevertheless be used to assess scientific reliability. The potential for mischief is apparent.

Second, as a straightforward matter of interpretation, the automatic sanction of exclusion adopted by Fed. R. Civ. P. 37(c)(1) applies "at a trial, at a hearing, or on a motion." A hearing under Fed. R. Evid. 104, on an *in limine* motion to exclude, is plainly within the specific text of the Rule. Petitioners' argument would have the general permission granted by Fed. R. Evid. 104(a) supplant the specific enforcement device mandated by Fed. R. Civ P. 37, even though precisely the same goal (an adversarial process enhanced by disclosure, rather than compromised by ambush) applies as well to the proceeding under Rule 104(a) to assess reliability, as to the ultimate trial of the issue of fact to which the proposed expert testimony is addressed. These are precisely the circumstances in which the canon of construction that the specific controls over the general applies, and negates Petitioners' contention.

Thus both reason and record point to the same result: there is nothing warranting this Court's plenary review of the rulings challenged by Petitioners.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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